Supreme Court, U.S.
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No. 96-945

In The

Supreme Court of the United States

October Term, 1996

R. DERRY CROSBY, D.O.,

Petitioner,

vs.

HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY, GEORGIA, d/b/a SOUTH GEORGIA MEDICAL CENTER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS THE HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY, GEORGIA D/B/A SOUTH GEORGIA MEDICAL CENTER AND MEMBERS OF THE HOSPITAL AUTHORITY

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QUESTIONS PRESENTED

1. Whether a Georgia hospital authority acting on an application for hospital staff privileges as required by Georgia statute is entitled to "state action" immunity from federal antitrust laws.

2. Whether physicians participating on statutorily authorized peer review committees of a Georgia hospital authority actively supervised by the hospital authority are entitled to "state action" immunity.

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STATEMENT OF THE CASE

This case involves a decision by a state-created hospital authority to deny privileges to a physician based on his training. Respondent Hospital Authority of Valdosta and Lowndes County, Georgia d/b/a South Georgia Medical Center ("the Authority") is a governmental entity created by state statute. It was authorized pursuant to state law to review and deny Petitioner's request for staff privileges.

Alleging that the denial of his application for privileges violated federal antitrust laws, Petitioner R. Derry Crosby sued the Authority and the peer review physicians who reviewed and made recommendations on his application for staff privileges. Dr. Crosby now comes to this Court seeking review of the Eleventh Circuit's decision that Respondents are entitled to "state action" immunity.

In September 1986, Dr. Crosby applied for orthopedic surgical staff privileges with the Authority. Dr. Crosby's application was governed by the By-laws of the Medical Staff approved by the Authority ("the By-laws").

The By-laws provide: "The applicant shall have the burden of producing adequate information for a proper evaluation of his competency, character, ethics, health status and other qualifications and for resolving any doubts about such qualifications."

The By-laws also provide: "Physicians applying for Staff Membership in the specialty of Orthopedics must demonstrate by training, experience and performance the requirements for eligibility in this specialty as designated by the American Board of Orthopedics and be either Board Certified or Board Eligible." (The complete name of the "American Board of Orthopedics"

is the "American Board of Orthopedic Surgery." The record shows all parties understood "American Board of Orthopedics" to mean "American Board of Orthopedic Surgery.")

The requirements for eligibility designated by the American Board of Orthopedic Surgery include completion of an accredited orthopedic residency program. To be accredited by the American Board of Orthopedic Surgery, a residency program must be accredited by the Accreditation Council for Graduate Medical Education (ACGME).

Dr. Crosby graduated from Valdosta State University in Valdosta, Georgia. He thereafter attended and graduated from West Virginia College of Osteopathy where he earned a doctor of osteopathy degree. He then completed an orthopedic surgical residency program at Memorial Hospital in York, Pennsylvania.

Before he began his residency at Memorial Hospital, Dr. Crosby was advised by a physician on staff with the Authority that if he wanted to seek staff privileges with the Authority he should attend an ACGME-accredited residency.

Dr. Crosby's former partner, Dr. Goss, is also an osteopathic orthopedic surgeon. He completed an ACGME-accredited residency program and thus met the By-law requirements. His application was approved by the Authority, and Dr. Goss is currently a member of the staff at South Georgia Medical Center. At least two other doctors of osteopathy have also served on the South Georgia Medical Center staff.

The orthopedic residency program at Memorial Hospital which Dr. Crosby completed, however, was not ACGME-accredited. For this reason, Dr. Crosby did not meet the requirements of the By-laws for staff membership.

Pursuant to the By-laws, Dr. Crosby's application was reviewed by the following committees of the Medical Staff: the Orthopedic Service of the Department of Surgery, the Credentials Committee, the Executive Committee, and an Ad Hoc Hearing Committee. The Orthopedic Service recommended denial because Dr. Crosby's training did not satisfy the By-laws. The Orthopedic Service also stated there were enough orthopedic surgeons active on the staff. The Credentials Committee voted to recommend denial for the sole reason that Dr. Crosby did not comply with the By-laws because his residency was not accredited. The Executive Committee voted to sustain the Credentials Committee's recommendation. The Ad Hoc Hearing Committee, following a hearing at which Dr. Crosby presented his qualifications and credentials, concluded the recommendation of the Executive Committee was appropriate. Pursuant to the By-laws, the application was referred back to the Executive Committee, which voted to uphold the Ad Hoc Hearing Committee's recommendation of denial on the basis that Dr. Crosby did not meet the By-law criteria.

Following this peer review process, the Medical Staff recommended that the Authority deny Dr. Crosby's application. The reason for the Medical Staff's recommendation was that Dr. Crosby did not satisfy the requirements of the By-laws for staff membership because he did not complete an ACGME-accredited residency.

Under the By-laws and Georgia law, the determination upon applications for staff privileges rests with the Hospital Authority. The Medical Staff acts through its peer review committees only to make a recommendation to the Authority.

After receiving the Medical Staff's recommendation, the Authority conducted its own hearing during which it thoroughly

considered Dr. Crosby's application. Dr. Crosby was represented by counsel. The Authority voted unanimously to deny Dr. Crosby's application for the following reasons:

> 1. The medical staff of South Georgia Medical Center, through its Executive Committee, has found that the applicant has not demonstrated by training, experience and performance the requirements for eligibility in the specialty of orthopedics.
>
> 2. The applicant has not met the "burden" placed on him by Article V, Section 1, b. of the medical staff bylaws of South Georgia Medical Center.
>
> 3. The applicant fails to meet the requirements of Article X, Section 2, b. - Surgical Service, 4., in that he has not demonstrated that he is either Board Certified or Board Eligible by the American Board of Orthopedics.

Thus, the Authority denied Dr. Crosby's application based on (1) the findings of the Medical Staff; (2) its own independent determination that Dr. Crosby had not carried his burden of establishing competency and qualifications; and (3) Dr. Crosby's failure to satisfy the By-law requirements because he did not complete an ACGME-accredited residency.

Dr. Crosby brought this action against (1) the Authority and the members of the Authority and (2) the individual doctors on the peer review committees. Dr. Crosby's suit contended the denial of his application violated federal antitrust laws. He also

contended the denial of his application violated purported state antitrust laws.

Respondents filed a motion to dismiss which the district court treated as a summary judgment motion and granted as to Dr. Crosby's federal antitrust claims on the following grounds: (1) Respondents are entitled to immunity from damages and injunctive relief pursuant to the "state action" immunity doctrine established by *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943); (2) Respondents are entitled to immunity from damages pursuant to the Local Government Antitrust Act ("LGAA"), 15 U.S.C.A. § 35-36 (Supp. 1994); and (3) Respondents are entitled to immunity from damages pursuant to the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.A. §§ 11101-11152 (Supp. 1994). The district court declined to exercise supplemental jurisdiction as to Dr. Crosby's purported state antitrust law claims.

The Eleventh Circuit affirmed the district court. Dr. Crosby's Petition to this Court seeks review only of the Eleventh Circuit's decision that Respondents are entitled to "state action" immunity.

SUMMARY OF ARGUMENT

This case does not warrant review by the Supreme Court. The Eleventh Circuit's decision follows the decisions of the Supreme Court, is consistent with circuit court decisions, and is in accord with Georgia law.

The Eleventh Circuit correctly held that the Authority and its members are entitled to "state action" immunity because (1) the Authority is a political subdivision of the state; (2) the state has generally authorized the Authority to act on applications for staff privileges; and (3) the state has clearly articulated a policy authorizing the challenged conduct.

The Eleventh Circuit's conclusion that Georgia hospital authorities are political subdivisions of the state for state action immunity purposes is consistent with circuit court decisions in other cases, is in accord with Georgia law that Georgia hospital authorities are governmental entities, and follows the rationale of the Supreme Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985).

The Eleventh Circuit also recognized that O.C.G.A. § 31-7-7(a) generally authorizes hospital authorities in Georgia to act on applications for staff privileges. *See also Ramey v. Hospital Authority of Habersham County*, 218 Ga. App. 618, 462 S.E. 2d 787, 788 (1995) (under Georgia Law, hospital authorities are responsible for selecting staff members).

In addition, the Eleventh Circuit correctly held the Georgia legislature has clearly articulated a policy authorizing the challenged conduct. Dr. Crosby contends his application was denied because the initial peer review committee determined there were enough orthopedic surgeons on staff with the Authority. Crosby Petition, pp. 5, 13. This challenged conduct was the foreseeable result of the explicit authorization in O.C.G.A. § 31-7-7(a) that hospital authorities may base their staff privilege decisions on the "appropriate utilization of hospital facilities." This challenged conduct was also the foreseeable result of O.C.G.A. § 31-7-15(a) and (b), which specifically require hospitals to provide for the review of applicants for staff privileges and authorize the provision of this review by medical staff peer review committees.

Dr. Crosby also challenges the denial of his application based on his failure to attend an ACGME-accredited residency. Crosby Petition, pp. 10-11, 13, 24. This challenged conduct was foreseeable based on the mandatory directive of O.C.G.A. § 31-7-7(a) that hospital authorities must consider the

"demonstrated training" of each applicant for staff privileges. The Georgia legislature has also recognized that meeting the minimum requirements for state licensure does not entitle a practitioner to medical staff privileges. O.C.G.A. § 31-7-15(e). In addition, the Georgia courts have held Georgia hospital authorities may designate medical staff standards beyond the minimum requirements for state licensure. In a related case, the Eleventh Circuit, moreover, had already recognized that the Georgia courts have held that Georgia statutes authorize Georgia hospital authorities to require applicants for staff privileges to have attended an ACGME-accredited residency.

Dr. Crosby seeks to refute the Eleventh Circuit's correct finding of state action immunity by arguing a Georgia constitutional provision precludes the Georgia legislature from authorizing state hospital authorities to act anticompetitively. Dr. Crosby has misconstrued the scope of the Georgia Constitution, which in this case does not apply. More importantly, the Supreme Court, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), expressly rejected any inquiry into whether a political subdivision's challenged conduct was defective under state law, which is the very inquiry Dr. Crosby pursues in this case.

The Eleventh Circuit also correctly held the peer review physicians are entitled to state action immunity because they acted as agents of the Authority. Alternatively, while the Eleventh Circuit did not need to reach the issue of active supervision, the Eleventh Circuit's decision that the peer review physicians are entitled to state action immunity is also correct for the reason that their role in the peer review process was actively supervised by the Authority, a state governmental entity. The Eleventh Circuit's decision that the peer review physicians

are entitled to state action immunity comports with the rationale of *Town of Hallie* and is consistent with other decisions of this Court and the decisions of other circuits.

REASONS FOR DENYING THE WRIT

This case does not present any issue warranting review by the Supreme Court. The Eleventh Circuit's decision is consistent with the decisions of this Court. It is also based on Georgia statutory and case law.

I.

THE HOSPITAL AUTHORITY AND ITS MEMBERS ARE ENTITLED TO "STATE ACTION" IMMUNITY.

In *Parker v. Brown*, the Supreme Court first recognized federal antitrust laws do not apply to anticompetitive conduct of a state agency acting on behalf of its legislature. The Court reasoned that the purpose of federal antitrust laws was to prohibit private restraints on trade, not to prohibit state action of a local nature intended to benefit the state citizens. *Parker v. Brown*, 317 U.S. at 349-353.

In *Town of Hallie v. City of Eau Claire*, the Supreme Court applied the "state action" immunity doctrine to the anticompetitive actions of political subdivisions of the state. As this Court has held, the decisions of political subdivisions do not have to be actively supervised by the state. To obtain state action immunity under *Town of Hallie*, a political subdivision of the state must show: (1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state

policy authorizing anticompetitive conduct. *City of Columbia*, 499 U.S. at 372-373; *Town of Hallie*, 471 U.S. at 47.

A. The Authority Is A Political Subdivision Of The State For State Action Immunity Purposes.

Hospital authorities are special governmental entities through which healthcare is provided to citizens of the state. Following the decisions of this Court, the Eleventh Circuit and other circuits have recognized that hospital authorities are political subdivisions of the state for state action immunity purposes. *Martin v. Memorial Hospital of Gulfport*, 86 F.3d 1391, 1398-1399 (5th Cir. 1996); *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184, 1188 (11th Cir. 1994); *Askew v. DHC Regional Healthcare Authority*, 995 F.2d 1033, 1037-1038 (11th Cir.), *cert. denied*, 510 U.S. 1012, 114 S. Ct. 603, 126 L. Ed. 568 (1993).

The Eleventh Circuit's decision is properly founded on established Georgia law. The Georgia legislature created Georgia hospital authorities. In doing so, the legislature stated each hospital authority is a "public body corporate and politic." O.C.G.A. § 31-7-72. The legislature also specifically empowered hospital authorities to exercise "public and essential governmental functions." O.C.G.A. § 31-7-75.

The Georgia Supreme Court has in relevant contexts held that Georgia hospital authorities are governmental entities. In *Martin v. Hospital Authority of Clarke County*, 264 Ga. 626, 449 S.E. 2d 827, 828 (1994), the Georgia Supreme Court held Georgia hospital authorities are not liable for punitive damages because they are "governmental entities." In *Cox Enterprises v. Carroll City/County Hospital Authority*, 247 Ga. 39, 273 S.E. 2d 841 (1981), the Georgia Supreme Court held a Georgia hospital authority could not bring a libel action because it is a

governmental entity as opposed to a private person. The court stated "the Authority is merely the way the government has chosen to do its business in this instance." 273 S.E. 2d at 846. The court also concluded: "We have reviewed the nature of the authority and determined that it is a governmental entity." *Id.*

In fact, the Authority derives its power to act upon staff privilege applications pursuant to O.C.G.A. § 31-7-7(a). O.C.G.A. § 31-7-7(a), by its very terms, applies to hospitals owned or operated by "the state, any political subdivision thereof, or any municipality." Recognizing that Georgia hospital authorities are granted the power to refuse or revoke privileges pursuant to O.C.G.A. § 31-7-7(a), the Georgia courts have never questioned that a Georgia hospital authority is a "political subdivision" of the state within the meaning of O.C.G.A. § 31-7-7(a). *Stein v. Tri-City Hospital Authority*, 192 Ga. App. 289, 384 S.E. 2d 430, 432 (1989).

Dr. Crosby, however, contends that Georgia hospital authorities cannot be considered political subdivisions of the state for state action immunity purposes. Dr. Crosby erroneously relies upon dicta from *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 440 S.E. 2d 195 (1994), which does not control the issue before the Court in this case. *Thomas v. Hospital Authority of Clarke County* was decided prior to *Martin v. Hospital Authority of Clarke County*, in which the Georgia Supreme Court held Georgia hospital authorities are governmental entities. Also, the issue in *Thomas* was limited to whether a hospital authority is "the state, or a department of agency of the state" within the meaning Article I, Section II, paragraph IX of the Georgia Constitution of 1983 for purposes of state sovereign immunity. The Eleventh Circuit correctly held that whether a hospital authority is "the state, or a department or agency of the state" within the meaning of this particular provision of the Georgia Constitution for sovereign immunity

purposes does not control the issue whether a hospital authority is a political subdivision for state action immunity purposes. Petition Appendix, p. 17a.

As the Eleventh Circuit correctly noted, the determination of the issue whether a hospital is a political subdivision for state action immunity purposes is properly guided by the rationale of *Town of Hallie*. Petition Appendix, pp. 17a, 19a. In *Town of Hallie*, the Court reasoned that a political subdivision need not show active supervision because a political subdivision is exposed to public scrutiny pursuant to "sunshine" laws and that its officers, unlike corporate heads, are checked to some degree through the electoral process. 417 U.S. at 45, n. 9. In Georgia, hospital authorities are subject to the Georgia sunshine laws. *Clayton County Hospital Authority v. Webb*, 208 Ga. App. 91, 430 S.E. 2d 89 (1993); O.C.G.A. § 50-18-72(c)(1). Georgia hospital authorities are also checked through the electoral process in that authority members are appointed by the elected officials of the governing body of the county or city. O.C.G.A. § 31-7-72(a). Applying the rationale of *Town of Hallie*, the Eleventh Circuit correctly concluded that the nexus between the state and a hospital authority is sufficiently strong that, when combined with a clearly articulated policy in favor of the challenged conduct, there is little danger that a hospital authority is involved in a private price fixing arrangement. Petition Appendix, p. 19a.

For these reasons, the Eleventh Circuit correctly held the Hospital Authority is a "political subdivision" for state action immunity purposes. Further, the Eleventh Circuit correctly held the same test applies to the members of the Authority. Petition Appendix, p. 21a. *Accord Berger v. Cuyahoga County Bar Association*, 983 F.2d 718, 722 (6th Cir.) (individual members of a state supreme court are entitled to the same state action immunity as the court), *cert. denied*, 113 S. Ct. 2416 (1993).

B. The Authority Is Generally Authorized By Statute To Deny Applications For Staff Privileges.

The Authority is generally authorized under state law to act upon staff privilege applications. The statute pursuant to which hospital authorities are empowered to act upon applications for staff privileges is O.C.G.A. § 31-7-7(a). In Georgia, hospital authorities are responsible for selecting staff members and have broad power to set standards for and to grant or deny staff privileges. *Ramey v. Hospital Authority of Habersham County*, 218 Ga. App. 618, 462 S.E. 2d 787, 788 (1994); *Cobb County-Kennestone Hospital Authority v. Prince*, 242 Ga. 139, 249 S.E. 2d 581 (1978); *Mitchell County Hospital Authority v. Joiner*, 229 Ga. 140, 189 S.E. 2d 412 (1972).

C. The State Has Clearly Articulated A State Policy Authorizing The Challenged Conduct.

1. The challenged conduct was the forseeable result of Georgia statutes.

The Supreme Court has held that the "clear articulation" test is satisfied if the challenged conduct was the "foreseeable result" of state legislation. *City of Columbia*, 499 U.S. at 373; *Town of Hallie*, 471 U.S. at 42.

In this case, the challenged conduct was the foreseeable result of the following Georgia statutes:

O.C.G.A. § 31-7-7(a) provides:

> Whenever any licensed doctor of medicine, doctor of podiatric medicine, doctor of osteopathic medicine, or doctor of dentistry shall make application for permission to treat

> patients in any hospital owned or operated by the state, any political subdivision thereof, or any municipality, the hospital shall act in a nondiscriminatory manner upon such application expeditiously and without unnecessary delay considering the applicant on the basis of the applicant's *demonstrated training*, experience, competence, and availability and reasonable objectives, including, but not limited to, *the appropriate utilization of hospital facilities.*

O.C.G.A. § 31-7-7(a) (emphasis added).

O.C.G.A. § 31-7-15(a) and (b) provide that "a hospital . . . shall provide for the review of professional practices in the hospital," with this review to include the "evaluation of medical and health care services or the qualifications and professional competence of persons performing or seeking to perform such services" and that this review "may be performed by . . . a committee of physicians appointed . . . by the governing board or medical staff of a licensed hospital."

O.C.G.A. § 31-7-15(e) provides that nothing in the Georgia Code "shall be deemed to require any hospital . . . to grant medical staff membership or privileges to any licensed practitioner of the healing arts."

O.C.G.A. §§ 36-65-1 and 2 provide that "in the exercise of powers granted to them by law, local governing authorities of cities and counties are acting pursuant to state policy" and that "in the exercise of such powers, such local governing authorities shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia."

Based on these statutes, the Eleventh Circuit correctly held that the clear articulation question is not a close one. Petition Appendix, p. 42a.

Dr. Crosby erroneously complains that his application was denied because the initial peer review committee determined there were a sufficient number of orthopedic surgeons on staff. Crosby Petition, pp. 5, 13. The subsequent peer review committees and the Authority undisputably made their recommendations and the ultimate decision on Dr. Crosby's application based on other reasons. However, even if the Authority's reason for denying Dr. Crosby's application had been that there were a sufficient number of orthopedic surgeons on staff, this decision would have been consistent with Georgia statutes which expressly contemplate the denial of staff privilege applications based on any reasonable objectives, including "the appropriate utilization of hospital facilities." O.C.G.A. § 31-7-7(a). Based on this express statutory authority, the Eleventh Circuit correctly held that the allegedly anticompetitive conduct of which Dr. Crosby complains was foreseeable. Petition Appendix, p. 42a. (Interestingly, Dr. Crosby's Petition to this Court does not deal with or even mention O.C.G.A. § 31-7-7(a), even though it is the very statute requiring Georgia hospital authorities to act on staff privilege applications and even though it is quoted in its entirety by the Eleventh Circuit and is the basis of the Eleventh Circuit's decision that the challenged conduct was foreseeable.)

In addition, O.C.G.A. § 31-7-15(a) mandates review of applicants for staff privileges and O.C.G.A. § 31-7-15(b) expressly states this mandated review may be provided by a medical staff peer review committee. Given these statutory directives, the legislature could foresee a hospital authority denying applications for privileges based upon the recommendation of a medical staff peer review committee.

Following this Court's decision in *Town of Hallie*, the Eleventh Circuit has in previous cases held that the denial of staff privilege applications based on medical staff recommendations is the foreseeable result of state legislation authorizing medical staff peer review of applicants for staff privileges. *See, e.g., Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1462 (11th Cir. 1991); *Bolt v. Halifax Hospital Medical Center*, 980 F.2d 1381, 1386, 1388 (11th Cir. 1993).

Dr. Crosby also contends the Authority acted anticompetitively when it set and considered training requirements beyond those required for state licensure. Specifically, Dr. Crosby challenges the Authority's consideration of whether his residency was ACGME-accredited. Crosby Petition, pp. 10-11, 13, 24. Again, this challenged conduct is plainly foreseeable under Georgia statutes. Georgia statutes specifically require hospital authorities to consider each applicant's "demonstrated training." O.C.G.A. § 31-7-7(a). Furthermore, the Georgia legislature expressly stated that hospital authorities are not required to grant staff privileges to any licensed practitioner. O.C.G.A. § 31-7-15(e). Thus, the legislature has recognized that satisfying the minimum requirements for state licensure does not entitle a practitioner to medical staff privileges. Based on these Georgia statutes, the denial of an application based on an applicant's residency training was obviously foreseeable.

In addition, the Georgia courts have repeatedly held that Georgia hospital authorities may designate standards for staff privileges that go beyond the statutory minimum requirements for state licensure. *Cobb County-Kennestone Hospital Authority v. Prince*, 242 Ga. 139, 249 S.E. 2d 581 (1978); *Mitchell County Hospital Authority v. Joiner*, 229 Ga. 140, 189 S.E. 2d 421 (1972). Moreover, the Eleventh Circuit had previously recognized that the Georgia courts have held that Georgia

hospital authorities acting pursuant to the power conferred upon them by the legislature in O.C.G.A. § 31-7-7(a) may legitimately require applicants for staff privileges to have attended an ACGME-accredited residency training program. *Silverstein v. Gwinnett County Hospital Authority*, 861 F.2d 1560, 1568-1570 (11th Cir. 1988). The *Silverstein* court also held that the recognized distinctions between osteopathic and allopathic post-graduate specialty training provide a rational basis for restricting a medical staff to licensed physicians who have completed accredited post-graduate programs for the legitimate purpose of assuring and standardizing quality care. 861 F.2d at 1565. Moreover, the *Silverstein* court held that given the well-defined review standards and the accepted differences in allopathic and osteopathic postgraduate specialty training, requirements of standardized postgraduate specialty training accredited by a selected established organization are reasonably related to medical care quality. 861 F.2d at 1567.

Also supporting the Eleventh Circuit's finding of a clearly articulated state policy is the Georgia legislature's express statement that it contemplates the exercise of the powers delegated to local authorities to result in anticompetitive conduct. O.C.G.A. § 36-65-1 and 2. These Code sections provide that local governing authorities act pursuant to state policy and shall be immune from antitrust liability to the same degree as the state. The legislature thus provided the explicit recognition of potential anticompetitive conduct that goes beyond what a political subdivision must show for state action immunity. *Town of Hallie*, 471 U.S. at 42; *McCallum v. City of Athens, Georgia*, 976 F.2d 649, 665 (11th Cir. 1992).

In summary, the Eleventh Circuit correctly concluded the challenged conduct was the foreseeable result of state legislation. The consideration of the number of doctors in a particular specialty on staff was the foreseeable result of the authorization

in O.C.G.A. § 31-7-7(a) to consider "the appropriate utilization of hospital facilities." Also, the consideration of the medical staff's recommendation was the foreseeable result of O.C.G.A. § 31-7-15(a) and (b). In addition, Authority's consideration of training requirements beyond those necessary for state licensure was the foreseeable result of the mandatory requirement of O.C.G.A. § 31-7-7(a) that the Hospital Authority consider each applicant's "demonstrated training" and the recognition of O.C.G.A. § 31-7-15(e) that satisfying the minimum requirements of state licensure does not entitle a practitioner to medical staff privileges. The Eleventh Circuit's finding on this issue is thus well grounded in Georgia statute. It also is supported by Georgia case law, follows the principles established by this Court, and is consistent with other circuit court decisions.

2. The Georgia Constitution is inapplicable and irrelevant.

Dr. Crosby incorrectly argues that Article III, Section 6, paragraph 5(c) of the Georgia Constitution is inconsistent with the Georgia legislature's power to authorize Georgia hospital authorities to act anticompetitively. Dr. Crosby is wrong for at least three reasons.

First, Dr. Crosby hinges his argument on the misstatement that the Constitution prescribes all anticompetitive "conduct." Crosby Petition, p. 9. The Georgia Constitution provides only that the General Assembly shall not have the power to authorize any "contract or agreement" which may have the effect of lessening competition. A hospital authority's unilateral denial of an application for staff privileges pursuant to O.C.G.A. § 31-7-7(a) is not a "contract or agreement." Also, the Georgia courts have held that by-law provisions establishing criteria for staff membership are not contracts. *Todd v. Physicians & Surgeons Community Hospital, Inc.*, 165 Ga. App. 656, 302 S.E. 2d 378 (1983) (hospital by-laws setting requirements for appointment

to a medical staff are not contracts); *St. Mary's Hospital of Athens, Inc. v. Radiology Professional Corporation*, 205 Ga. App. 121, 421 S.E. 2d 731 (1992) (by-laws do not create any contractual rights in respect to staff privileges).

Second, even as to "contracts and agreements," the Georgia courts have followed a "rule of reason" when applying the clause of the Constitution upon which Dr. Crosby relies. This rule protects contracts that are reasonable in light of the interest of the parties and the interest of the public. "Georgia Courts have consistently held that the prohibition does not impose an absolute bar against every kind of agreement." *Howard Schultz & Assoc. v. Broniec*, 239 Ga. 181, 236 S.E. 2d 265, 267 (1977). The test in Georgia is whether the restraint involved is injurious to the public interest. *City of Calhoun v. North Ga. Elect. Membership Corp.*, 233 Ga. 759, 213 S.E. 2d 596, 603 (1975). Whether a contract or agreement lessens competition within the meaning of this provision of the Georgia Constitution is relative and depends upon an analysis of the benefits to the public at large. *State v. Central of Ga. Ry. Co.*, 109 Ga. 716, 35 S.E. 37, 39-40 (1900). Contrary to Dr. Crosby's argument, the Georgia courts did not overrule this "rule of reason" in *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E. 2d 253 (1991). Indeed, the Georgia courts have continued to apply the rule of reason in subsequent cases. *See, e.g., McAlpin v. Coweta Fayette Surgical Associates*, 217 Ga. App. 669, 458 S.E. 2d 499 (1995); *National Emergency Service, Inc. v. Wetherby*, 217 Ga. App. 42, 456 S.E. 2d 639 (1995), *cert. denied* (May 25, 1995). Here, as the Eleventh Circuit correctly held, the public has an interest in the appropriate utilization of hospital facilities and the maintenance of a good mix of doctors and specialties on hospital staffs. Petition Appendix, p. 44a. The public interest is also served by hospital authorities considering medical staff recommendations and the demonstrated training of applicants for staff privileges. O.C.G.A. §§ 31-7-7(a) and 31-7-15 are a reasonable response to the public interest and are not injurious to the public interest.

Third, and most importantly, even if a political subdivision's exercise of its delegated authority is potentially or arguably contrary to state law, this Court has previously held that a federal court should not engage in such an inquiry in determining the application of state action immunity. In *City of Columbia*, the Supreme Court held that, for state action immunity purposes, "it is enough" to satisfy the authority to act anticompetitively if anticompetitive conduct is the foreseeable result of "what the statute authorizes." 499 U.S. at 372-373. For state action immunity purposes, the Supreme Court rejected an inquiry into whether the political subdivision's actions are substantively or procedurally defective under state law. The Court agreed that this type of expansive inquiry would have the unacceptable consequences of the federal courts in antitrust cases becoming the standard reviewer of state or local activity when it is alleged that the governmental body exercises power in a manner not authorized by state law. The Court acknowledged:

> If the antitrust court demands unqualified "authority" in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. We should not lightly assume that Lafayette's authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for "authority" in the full administrative law sense.

Id. at 372, quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b, p. 145 (Supp. 1989). In order to prevent state action immunity from undermining the very interest of federalism it is designed to protect, the Court adopted a concept of authority, for state action immunity purposes, that is broader than what is applied to determine the legality of the political subdivision's action under state law. *Id.* at 372.

For any of these three reasons, Dr. Crosby's reliance upon the Georgia Constitution fails. The most important of these three reasons is that Dr. Crosby's argument invites the very inquiry which this Court specifically rejected in *City of Columbia.*

II.

THE PEER REVIEW PHYSICIANS ARE ALSO ENTITLED TO "STATE ACTION" IMMUNITY.

In order to conduct necessary credentialing decisions, the Hospital Authority must rely on the initial review of physician members of its staff. In this case, the Eleventh Circuit correctly held the peer review physicians are entitled to state action immunity because they acted as agents of the Authority. Alternatively, while the Eleventh Circuit did not reach the active supervision issue, the Eleventh Circuit's decision that the peer review physicians are entitled to state action immunity is also correct because their role in the peer review process was actively supervised by the Authority.

Because the Authority retains the ultimate decision-making power on staff privilege applications, those directed by the Authority to review an applicant's qualifications and to report a recommendation to the Authority act as agents of the Authority and are entitled to the same state action immunity as the Authority. This Court has previously recognized that agents of

state entities are entitled to state action immunity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 361, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1997) (a state bar association making a recommendation to a state supreme court as part of the attorney disciplinary process acts as an agent of the state supreme court and is entitled to state action immunity). *See also Cohn v. Bond*, 953 F.2d 154, 157-159 (4th Cir. 1991) (members of a medical staff peer review committee of a publicly owned hospital, in making staff privilege recommendations, are acting as agents of the hospital and entitled to the same state action immunity as the hospital board). Contrary to Dr. Crosby's argument, the Eleventh Circuit correctly held that even though a hospital authority and a staff physician are separate entities, a staff physician is nonetheless an agent of the authority when the physician is serving on a statutorily authorized peer review committee for purposes of the hospital authority complying with statutorily required review of an applicant for staff privileges. Appendix Petition, pp. 30a-36a.

Alternatively, the role of the peer review committees was actively supervised by the Authority. Under Georgia law, the power to act on an application for staff privileges rests with the Authority, not the medical staff. *Ramey v. Hospital Authority of Habersham County*, 218 Ga. App. 618, 462 S.E. 2d 787, 788 (1995). The peer review committees serve only to make a recommendation to the Authority. In this case, the Authority conducted a thorough hearing at which Dr. Crosby was represented by counsel. Only after this process did the Authority make its decision on Dr. Crosby's application. And in doing so, the Authority based its decision not only on the medical staff's recommendation but also on its own independent findings. Thus, consistent with Georgia law, the Hospital Authority actively supervised the peer review physicians and the Hospital Authority itself made the decision to deny Dr. Crosby's application.

Contrary to Dr. Crosby's argument, the Authority is a political subdivision of the state for purposes of active supervision. Crosby Petition, p. 23. The Authority is a "public body corporate and politic" which exercises "public and essential governmental functions." O.C.G.A. §§ 31-7-72, 31-7-75. As the Georgia Supreme Court has held, the Authority is "merely the way the government has chosen to do its business in this instance." *Cox Enterprises*, 273 S.E. 2d at 846. *Accord Sandcrest Outpatient Services v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139, 1146 (4th Cir. 1988) (members of a public hospital ad hoc medical staff committee are entitled to LGAA immunity where the committee's role was advisory and the hospital board supervised and reviewed the committee's recommendation).

The active supervision of the medical staff physicians by the Authority is also consistent with the rationale of *Town of Hallie*. The function of the active supervision requirement is to ensure that private actors are acting pursuant to state policy and not to further their own interests. *Town of Hallie*, 471 U.S. at 46-47. Here, the supervision provided by the Authority serves this purpose. Because the peer review committees merely make a recommendation and because the Authority actively reviewed the applicant's training and qualifications, the Authority's active supervision of the medical staff peer review committees serves the function of protecting against the peer review physicians acting to further their own interest rather than the governmental interest of the state.

Finally, despite Dr. Crosby's contentions, the Eleventh Circuit's ruling is not contrary to the decisions of this Court or the Ninth Circuit case upon which Dr. Crosby relies. With the exception of *Patrick v. Berger*, 486 U.S. 94, 108 S. Ct. 1685, 100 L. Ed. 2d 83 (1988), none of the cases upon which Dr. Crosby relies involved medical staff peer review physicians

reviewing a practitioners' qualifications for staff privileges. And *Patrick* is plainly distinguishable. The hospital in *Patrick* was not operated by a hospital authority or other political subdivision of the state. *Patrick* did not involve a hospital authority which reviewed the recommendation of the peer review physicians and which was ultimately responsible for all decisions on staff privilege matters. The basis of the Court's decision in *Patrick* was that there was "no State actor" which actively supervised the decisions of the peer review physicians. 486 U.S. at 105.

CONCLUSION

The Georgia legislature created the Respondent Authority and gave it the express power to review and assess the qualifications of practitioners applying for staff privileges and by statute expressly authorized it to rely upon the recommendations of peer review committee physicians. Based upon the power expressly granted the Authority, the specific statutory provisions pursuant to which the Authority and the peer review physicians acted, and established case law, the Eleventh Circuit correctly held the Authority and the peer review physicians are entitled to "state action" immunity.

Dr. Crosby is a disappointed physician who was denied staff privileges at South Georgia Medical Center because he did not meet the objective residency training requirements of the By-laws. As this Court recognized in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), the denial of privileges to one physician is unlikely to have any substantial anticompetitive effect. Because Dr. Crosby's Petition raises no new issues, and because the Eleventh Circuit's decision is consistent with established precedent of this Court, the Hospital Authority respectively submits that Dr. Crosby's Petition should be denied.

Respectfully submitted,

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